Supreme Court, U.S.
FILED

001830 JUN - 7 2001

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

October Term 2000

JAMES H. DENNIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari To The
United States Court of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIAN W. SHAUGHNESSY
SHAUGHNESSY, VOLZER
& GAGNER, P.C.
1155 Fifteenth Street, N.W.,
Suite 502
Washington, D.C. 20005
Telephone: (202) 371-2281

Counsel for Petitioner

Balmar Services, Inc., Washington, D.C. 20005 (202) 682-9829

57 pp

QUESTIONS PRESENTED

1. Whether, when the decision of the Eleventh Circuit Court of Appeals determined that the trial court did not err by adding a statutory victim to the indictment in Counts 1, 2, 4, and 5 and increasing the time frame of the indictment in Count 6 by five years, it acted in conflict with the previous authority of this Court, the Eleventh Circuit and other Circuits.

2. Whether, when the Eleventh Circuit held that the requirement of unanimity was met and there was sufficient evidence to permit conviction on Counts 1, 2, 4, 5, and 6, it acted in conflict with the previous authority of this Court, the Eleventh Circuit and other Circuits

3. Whether, when the Eleventh Circuit affirmed the money laundering convictions, it acted in conflict with settled law of this Court, the Eleventh Circuit and other Circuits with respect to the elements of money laundering and sufficiency of the evidence.

4. Whether the sentencing guidelines for money laundering were improperly applied in conflict with the Sentencing Guidelines and with the previous authority of this Court, the Eleventh Circuit and other Circuits.

LISTING OF PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were:

Plaintiff/Respondent:.....United States of America

Defendant/Petitioner: ..... James H. Dennis

RULE 29.6 STATEMENT

There are no corporations as parties in this case.

TABLE OF CONTENTS

QUESTION PRESENTED i

LISTING OF PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO AMENDMENTS TO THE INDICTMENT 5

II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN THE APPLICATION OF THE LAW OF BANKRUPTCY 11

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL WHICH REQUIRE UN-ANIMITY AND SUFFICIENT EVIDENCE TO CONVICT ON BANKRUPTCY FRAUD 12

IV. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN THE APPLICATION OF SUFFICIENCY STANDARDS AND REQUIREMENTS OF A UNAMIMOUS VERDICT 18

V. THE DECISION BELOW APPLYING INCORRECT STANDARDS FOR WEIGHING THE SUFFICIENCY OF THE EVIDENCE OF MONEYLAUNDIRNG CONFLICTS WITH PRIOR DECISIONS OF THE ELEVENTH CIRCUIT AND OTHER CIRCUITS 19

VI. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN THE APPLICATION OF MONEY LAUNDERNG STANDARDS 22

VII. THE COURT'S DECISION APPLYING THE SENTENCING GUIDELINES FOR MONEY LAUNDERING IS IN CONFLICT WITH THE SENTENCING GUIDELINES AND CASE LAW IN THER ELEVENTH AND OTHER CIRCUITS 23

CONCLUSION 24

TABLE OF AUTHORITIES

FEDERAL CASES **PAGES**

Carter v. U.S., 530 U.S. 990 (2000) 5

Connecticut Natl Bank v. Germain, 503 U.S. 249 (1998) 6

In re Red Carpet v. Miller, 708 F.2d 1576 (11th Cir. 1983) 9, 10

In re Lewis, 12 B.R. 106 (Bky M.D.Ga. 1981) 10, 11

Jackson v. United States, 72 F. 2d 764 (3d Cir. 1934) 7

Jackson v. Virginia, 443 U.S. 307 (1979) 20

Kutler v. U.S., 79 F.2d 440 (3d Cir.1955) 7

Mills v. Maryland, 486 U.S. 367 (1988) 17

Stirone v. U.S., 361 U.S. 212 (1959) 5, 6, 10

U.S. v. Allen, 551 F.2d 208 (8th Cir.1977) 9

U.S. v. Arge, 418 F.2d 721 (10th Cir. 1969) 5, 9, 12

U.S. v. Artrip, 942 F.2d 1568 (11th Cir. 1991) 6

U.S. v. Barrios, 993 F.2d 1522, (11th Cir.1993) 24

U.S. v. Cancelliere, 69 F.3d 1110 (11th Cir.1995) 5, 6, 10

U.S. v. Christo, 129 F.3d 578 (11th Cir.1997) 18, 20, 22

U.S. v. Cochran, 109 F.3d 660 (10th Cir. 1997) 22, 23

U.S. v. Figueroa, 666 F.2d. 1335 (11th Cir. 1982) 6

U.S. v. Floresca, 38 F.3d 706 (4th Cir. 1994) 6, 10

U.S. v. Garcia-Emanuel, 14 F.3d 1469 (10th Cir. 1994) 23

FEDERAL CASES **PAGES**

U.S. v. Grant, 971 F.2d 799 (1st Cir. 1992) 17

U.S. v. Greenwood, 74 F.3d 1241 (6th Cir. 1996) (unpublished) 9, 10

U.S. v. Heberman, 583 F. 2d 222 (5th Cir. 1978) 14, 19

U.S. v. Johnson, 971 F.2d 562 (10th Cir. 1992) 20, 22, 34

U.S. v. Keller, 916 F. 2d 628 (11th Cir. 1990) 5, 6, 10

U.S. v. Kirkland, 985 F.2d 535 (11th Cir.1993) 23

U.S. v. Koonce, 991 F.2d 693 (11th Cir.1994) 7

U.S. v. Lambert, 501 F.2d 943 (9th Cir.1974) (en banc) 6

U.S. v. Majors, 196 F.3d 1206 (11th Cir. 1999) 14, 19

U.S. v. Malgoza, 2 F.3d 1107 (11th Cir.1996) 23

U.S. v. Manukarious, 151 F.3d 694 (7th Cir. 1998) 20

U.S. v. Marker, 871 F.Supp. 1404 (DC Kan. 1994) 24

U.S. v. McIntosh, 124 F. 3d 1330 (10th Cir. 1997)..... 15, 17, 23

U.S. v. Melton, 763 F.2d 401 (11th Cir.1985) 15

U.S. v. Mullens, 65 F. 3d 1560 (11th Cir.1995) 24

U.S. v. Olanyi-Oke, 199 F.3d 767 (5th Cir. 1999) 20

U. S. v. Orton, 73 F.3d 331 (11th Cir. 1996) 24

U.S. v. Pennington, 20 F. 3d 593 (5th Cir. 1994) 14, 19

U.S. v. Resnik, 223 U.S. 207 (1936) 6

U.S. v. Rosenstein, 34 F. 630 (2d.Cir.1929) 7

U.S. v. Sanders, 929 F.2d 1466 (10th Cir. 1991) 20

U.S. v. Schoff, 151 F.3d 889 (8th Cir. 1998) 20

U.S. v. Steele, 147 F.3d 1316 (11th Cir.1998) (*en banc*) 6

FEDERAL CASES **PAGES**

U.S. v. Wilson, 98 F. 3d 281 (7th Cir. 1996)..... 24

U.S. v. Yacht, 135 F.Supp. 911 (S.D.N.Y.1955) 7

U.S. v. Zonca, 97 F. Supp. 1127 (M.D. Fla. 1999) 8

FEDERAL STATUTES

11 U.S.C. § 101 (10) 8, 10

18 USC §152(1) 2, 4, 8, 11, 23

18 USC §152(9) 12

18 USC §153 12

18 USC §154 12

18 USC §1956(a)(1)(B)(i) 3, 23

U.S.S.G. §2B1.1 24

U.S.S.G. §2F1.1(a) 23

U.S.S.G. §2S1.1(b)(2) 23, 24

OTHER AUTHORITIES

Collier on Bankruptcy, Vol. 2, ¶2905, 14th Ed. 1969 7

Wright, *Criminal Procedure*, 2d Ed. §126 7

No.

IN THE

Supreme Court of the United States

October Term 2000

JAMES H. DENNIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari To The
United States Court of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner James H. Dennis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on January 8, 2001, and the denial of petitioner's timely filed Petition for Rehearing on March 9, 2001.

OPINION BELOW

The opinion of the Court of Appeals, reported at 239 F.3d 1295, and the unreported denial of the Petition for Rehearing, appear in the Appendix hereto. No opinion was rendered by the District Court.

JURISDICTION

The judgment for the Court of Appeals for the Eleventh Circuit was entered on January 8, 2001. A timely filed Petition for Rehearing en banc was denied on March 9, 2001, and this petition for certiorari was filed within 90 days

of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §152. Concealment of assets; false oaths and claims; bribery

A person who -

- (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

* * * * * * * *

- (8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

- (9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor, shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 1956. Laundering of monetary instruments

(a)

- (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -

(A)

- (i) with the intent to promote the carrying on of specified unlawful activity; or
- (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part -

- (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
- (ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

STATEMENT OF THE CASE

On April 2, 1991, Callen, a corporation controlled by petitioner Dennis, filed for bankruptcy under Chapter 11. Callen's business, the operation of about 33 convenience stores with revenues of about $2 million per month, continued in Chapter 11 with petitioner as debtor in possession until the bankruptcy was converted to Chapter 7 in fall 1992. In

operating the business, petitioner established, as required, a debtor in possession account and other accounts whose existence and activities were fully and properly reported in the bankruptcy filing. The indictment charged that Mr. Dennis had concealed property of the estate consisting of fifty-five bank accounts (Count 1), revenue from five of the stores (Count 2), many transfers (aggregating $1.6 million) of estate funds (Count 4) and a transfer of $200,000 to his brother (Count 5), all in violation of 18 U.S.C. § 152(1), one count of destruction of records in violation of 18 U.S.C. § 152(8), thirty counts of money laundering (11-40), three counts of wire fraud and one count of bank fraud.

The government's evidence demonstrated that 1) all of the Callen and RAD (a corporation also controlled by petitioner Dennis) accounts that were required to have been disclosed in the bankruptcy filings were, in fact, disclosed, as were the bank accounts said to have been used in the money laundering charges, primarily the Callen Debtor-in-Possession ("DIP") account. The five stores whose revenues were said to have been concealed were disclosed in the Callen bankruptcy file. The government's own uncontroverted evidence also showed that all but two of the money laundering transactions were made from accounts fully disclosed in the bankruptcy file. An examination of the actual checks rather than the FBI agents' summary testimony concerning the checks, shows that the exceptions, Counts 11 and 15, were transfers not made, as alleged, from Callen bank accounts.

On May 10, 1997, based essentially on the foregoing evidence—all of which is fully cited in petitioner's briefs below without contradiction based on the record by the government --petitioner Dennis was convicted of four counts of bankruptcy fraud in violation of 18 USC §152 (1), one count of destroying estate records, and thirty counts of money laundering in violation of 18 USC §1956(a)(1)(B)(i), three counts of wire fraud and one of bank fraud. Mr. Dennis was sentenced to 125 months incarceration. By its opinion of January 8, 2001, the Eleventh Circuit Court of Appeals

reversed for sufficiency as to bank fraud, but affirmed all other counts and denied Mr. Dennis' Petition for Rehearing on March 9, 2001.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO AMENDMENTS TO THE INDICTMENT.

In its opinion the 11th Circuit concluded that a jury instruction, which permits conviction for concealment from "the Custodian of the Bankruptcy Court," for which appellant was not indicted, was not an impermissible amendment of the indictment. This is contrary to the law of the 11th Circuit, *U.S. v. Cancelliere*, 69 F.3d 1110 (11th Cir.1995); *U.S. v. Keller*, 916 F. 2d 628 (11th Cir. 1990) and the Supreme Court, *Stirone v. U.S.*, 361 U.S. 212 (1959).

In pertinent part, 18 USC §152(1) prohibits concealment of property of the estate "from a custodian, trustee, marshal or other officer of the court. . ." The names or identification of the parties from whom the property is concealed must be alleged in the indictment. *U.S. v. Arge*, 418 F.2d 721 (10th Cir. 1969). The opinion acknowledged that the indictment named only the U.S. Bankruptcy Court[1] as a statutory victim of the alleged bankruptcy concealment and did not identify or name any officer allegedly victimized. The trial court instructed the jury it could find guilt if the property were concealed from the custodian of the bankruptcy court. The trial court's amendment of the indictment was endorsed by the opinion.

It had previously been well settled that indictments are to be strictly construed. *Carter v. U.S.*, 530 U.S. 990 (2000);

---

[1] The opinion admits that although mentioned in the indictment, "creditors," who would be permissible statutory victims, were not included in the jury instruction.

Stirone v. U.S., supra; *U.S. v. Cancelliere*, supra; U.S. v. *Artrip*, 942 F.2d 1568 (11th Cir. 1991); *U.S. v. Keller, supra.* It had also previously been well settled that victims not included in the indictment may not be added by the court's instructions, *Stirone v. U.S., supra.* There can be no dispute that the trial court added "custodian" to the indictment although the grand jury[2] had chosen not to do so. Such a restated characterization of the indictment has long been proscribed in the 11th Circuit and other Circuits. *See e.g., U. S. v. Figueroa*, 666 F.2d. 1335 (11th Cir. 1982), *U.S. v. Floresca*, 38 F.3d 706 (4th Cir. 1994 (*en banc*) and *U.S. v. Lambert*, 501 F.2d 943 (5th Cir.1974) (*en banc*). Relying on an inapplicable civil case and an unpublished Sixth Circuit case, the opinion overruled *Stirone*, *Keller*, and *Figueroa* and ignored *Floresca*, *Lambert* and all other known rulings in this area by finding that in passing 18 USC §152 (1), Congress really meant "the United States Bankruptcy Court" when it said "a custodian."

As a general proposition, "Statutes creating crimes are to be strictly construed in favor of the accused." *U.S. v. Resnik*, 223 U.S. 207, 209 (1936). "In construing a statute we must begin, and often end as well, with the language of the statute itself." *U.S. v. Steele*, 147 F.3d 1316 (11th Cir.1998) (*en banc*). Where the language is clear and unambiguous, the court stops there because, "we must presume that Congress said what it meant and meant what it said." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1998). In the clear, unambiguous language of 18 USC §152 (1), Congress explicitly prohibited concealment from a "custodian, trustee, marshal or other officer of the court."

---

[2] As the opinion noted, the trustee and the administrator, both permissible statutory victims, were known to the government and could have been included in the indictment. Whatever the reason, the grand jury did not choose to identify them as victims.

There is no ambiguity in these words, nor has there ever been any ambiguity found by the cases interpreting § 152. *See, e.g., Kutler v. U.S.*, 79 F.2d 440 (3d Cir.1955) (court *must adhere strictly* to statutory victim in §152(1) prosecution); *U.S. v. Rosenstein*, 34 F. 630 (2d.Cir.1929); and *U.S. v. Yacht*, 135 F.Supp. 911 (S.D.N.Y.1955). Wright, *Criminal Procedure*, 2d Ed. §126, 2 *Collier on Bankruptcy*, ¶2905, 14th Ed. 1969.

In *Kutler*, defendant was indicted for concealing property from the referee when the statute forbade concealment only from the receiver. *Kutler* explained that

> Until 1926, it was not a crime to conceal property of the bankrupt estate from a receiver, but the Congress in that year enlarged the *number of persons* from whom it was a crime to conceal assets by adding receivers, U.S. marshals or other officers of the court charged with the control or custody of the property. 79 F.2d at 441. [Emphasis supplied.]

Using federal and state authorities and treatises, *Kutler*, in reversing, concluded—consistent with uniform past and present authority but inconsistent with the *Dennis* opinion--that "Where an essential word or clause is omitted from an indictment, such omission is fatal to the indictment, even though the court may know what was intended." *Ibid.*

Applying the principle of "inclusio unius est exclusio alterius," *U.S. v. Koonce*, 991 F.2d 693, 698 (11th Cir.1994), it is manifest that Congress intended[3] that only *persons*, not

---

[3] In grappling with the definition of custodian, *Jackson v. United States*, 72 F. 2d 764 (3d Cir. 1934), noted that "Congress in using the term [custodian] must have had some one in mind ... A custodian is a *person* other than a trustee or receiver into whose custody or charge any property belonging to the bankrupt estate comes." It is apparent that Congress saw the need to have a specific, identifiable person as the custodian who could be held responsible for the estate property.

the Bankruptcy Court, could be appointed custodians. Not only is there no authority to the contrary, §152's requirement that the indictment name a *person* from whom property is concealed is driven home by 11 U.S.C. § 101 (10) which defines a custodian as a "person." "Persons" are defined to include natural persons and corporations, but to exclude governmental entities, except in unusual circumstances not present here. This interpretation is common to all cases reviewed and is well stated in *U.S. v. Zonca*, 97 F.Supp. 1127, 1132 (M.D.Fla. 1999), which found in considering 18 USC §152 (1), that "The term "custodian" means a *person* authorized to by the bankruptcy court to administer..." The evil of concealment is seen to be the deceiving of a particular person responsible for the administration of the estate, not a court that is the forum for the proceedings.

Apparently recognizing that there was something wrong with the indictment's failure to name the custodian or some other statutory victim, to preserve the government's conviction the opinion was required to convert the indictment's "United States Bankruptcy Court" into a person identified[4] as "the custodian." To accomplish this, the 11th Circuit constructed a truly remarkable continuum:

> Custodians are appointed by the bankruptcy court; Mixon was appointed trustee and Bedsole administrator; the trustee and administrator are "custodians;" essentially, the custodian is a "custodian of the bankruptcy court;" and the bankruptcy court is the "ultimate custodian of the estate."

---

[4] At oral argument, Circuit Judge Cox inquired about why identification of a custodian was not problematic. He said he could not tell who the custodian was nor could government counsel assist him. Rehearing App. 18, 69-70. Where an instruction uses a term of legal significance, its meaning must be explained. This was not explained by the trial court.

Thus, according to the opinion, "U.S. Bankruptcy Court" equals "custodian" and Congress simply wasn't up to saying what it meant.

Relying on *U.S. v. Greenwood*, 74 F.3d 1241 (6th Cir. 1996) (unpublished) and *In re Red Carpet v. Miller*, 708 F.2d 1576 (11th Cir. 1983), the opinion found that the indictment's naming the U.S. Bankruptcy Court rather than the custodian "does not render it infirm" and, accordingly, the trial court's instruction[5] altering the indictment by inserting a statutory victim was not error.

An analysis of the opinion's scant authority for its groundbreaking expansion of the term "custodian" demonstrates that the cited authority is inapplicable. In *Red Carpet*, which did not construe §152, the trustee sought to obtain attorney fees from the attorney for the debtor in possession by claiming that the attorney for the debtor was much the same as a trustee or receiver because attorneys for the debtor had "obligations to the estate and are officers of the court." The 11th Circuit's actual holding in *Red Carpet* rejected the trustee's attempt to establish an equivalence between the attorney for the debtor and the attorney for the trustee, which is the same equivalence the *Dennis* opinion is attempting to establish between the U.S. Bankruptcy Court and a custodian. *Red Carpet* noted that the bankruptcy court is the "ultimate custodian" in order to demonstrate that the

---

[5] The opinion also affirmed the trial court's expansion of the terms of Count 6 by permitting the jury to convict during the period April 1991 to the date of the indictment in 1996, rather than the indictment's *three month* period of June to August 1993. This is prohibited by, among other cases, *U.S. v. Allen*, 551 F.2d 208, 211-212 (8th Cir.1977) and *U.S. v. Arge, supra.* This regular practice of the trial court's papering over the government's shoddily prepared indictment is further illustrated by the trial court's approval of the misidentification of the state into which the interstate wire was sent in the wire fraud counts. While petitioner may not have been misinformed, the government waived any amendment, the court instructed on the correct state and then sent the indictment with the wrong state to the jury.

court had jurisdiction to assess fees against a trustee, but had no jurisdiction to assess against an attorney for the debtor. Thus, *Red Carpet* does not provide authority for the 11th Circuit's proposition that the terms "the U.S. Bankruptcy Court" and "a custodian" are interchangeable in an indictment; if anything, it rejects that notion. *U.S. v. Greenwood* permits conviction for concealment of corporate funds where the indictment charged, as is required by § 152, concealment from the trustee, one of the listed statutory victims. *Greenwood* provides no support for and rejects by analogy the 11th Circuit's addition of a statutory victim not included in the indictment.

The opinion's legal framework is wholly inconsistent with *In re Lewis*, 12 B.R. 106 (Bky M.D.Ga. 1981), which concluded that Congress envisioned a custodian as a third party taking charge of property for the benefit of debtor's creditors. The court warned that, "If the definition of "custodian" in 11 U.S.C. §101(10) is not *strictly and narrowly construed*, the situations to which it could be applied are limitless." *Id.* at 109. The opinion's stretch to turn a court into a custodian is unique. No case or treatise considering §152(1), except the instant case, has ever concluded that "United States Bankruptcy Court" and "custodian" are interchangeable in an indictment and that a trial court may alter the grand jury's indictment at will.

The addition of "custodian" to the instruction, when it had not been included by the grand jury, constituted an impermissible amendment by the court, which is *per se* reversible under *Keller*. The 11th Circuit's endorsing that impermissible amendment overrules *Cancelliere*, *Keller* and *Stirone* and conflicts with *U.S. v. Floresca*, 38 F.3d 706 (4th Cir. 1994) (*per se* reversible to add a statutory party, following *Stirone*) and all other authority known to counsel. Because this is a significant departure from Circuit authority and is in direct conflict with other Circuits and this Court, certiorari should be granted.

II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN THE APPLICATION OF THE LAW OF BANKRUPTCY.

It is plain that the 11th Circuit decision in this case redefined the term "custodian" to mean "United States Bankruptcy Court." This redefinition was required so that petitioner's bankruptcy fraud convictions--and the dependent money laundering convictions--could be upheld. While this decision is wrong, its impact goes beyond the ten years meted out to petitioner.

The term "custodian" is a frequently used and vital term in bankruptcy, as well as other areas of the law. The very action taken by the 11th Circuit in this case had been previously denounced in *In re Lewis*, 12 B.R.at 109: "If the definition of "custodian" in 11 U.S.C. §101)(10) is not *strictly and narrowly construed*, the situations to which it could be applied are limitless." While there are many civil applications of the term and it is given careful consideration in 11 U.S.C. §101, the uniquely expansive 11th Circuit definition will undoubtedly proliferate vague, ambiguous prosecutions under §152(1). If the Bankruptcy Court can be a statutory victim and an indictment can be brought under §152(1) for concealment from the court *without limitation* as the opinion holds, concealment from any court employee will be indictable and allow prosecutors free rein to charge concealment without requiring the notice thought to have been provided by §152.

On the other hand, because the Bankruptcy Court can only act through its employees, disclosure to any court employee—a deputy clerk, a judge, a secretary to a judge—should require acquittal. Had petitioner known this was what he was charged with he certainly could have brought in some court employee who had seen his numerous disclosures in the bankruptcy files. This injection of ambiguity by the opinion

requires a finding that the indictment failed to inform[6] petitioner of the charges and does not provide double jeopardy protection since we do not know which employee he was indicted for concealing from. *See Arge, supra*, and Fed. R. Crim. P. 7(c). This illustrates the wisdom of Congress, rejected by the opinion, in requiring a specific person to be a statutory victim. This opinion will put in jeopardy every bankruptcy debtor and his attorney.

The redefinition also confounds the plain intent, long found in the bankruptcy cases cited above and common sense, that where concealment may defeat the purposes of the conservation of the estate, the specific individual who is responsible for marshalling the assets should be a statutory victim. Concealment of estate assets will be unprosecutable if disclosure to "the United States Bankruptcy Court," which must include some, most or all of its employees, is a defense to 18 U.S.C. §152.

This 11th Circuit opinion has thrown into confusion the heretofore well-defined term "custodian" and will have an impact wherever the term is now found.

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL WHICH REQUIRE UNANIMITY AND SUFFICIENT EVIDENCE TO CONVICT ON BANKRUPTCY FRAUD

Fed. R. Crim. P. 31(a) and the Sixth Amendment require that a jury verdict in a federal criminal trial be unanimous and that there be no variance from the indictment. A count may not be duplicitous and there must be sufficient evidence to sustain the jury's verdict. The Dennis opinion's mostly unstated findings on these issues require a consideration of

---

[6] The term "custodian" is found in 18 U.S.C. §152(9), §153 and §154, yet if the 11th Circuit's opinion's equating "U.S. Bankruptcy Court" and "custodian" is permitted, those statutes become incomprehensible.

the evidence, which reveals it was insufficient to support any of the 11th Circuit's findings.

The resolution of these issues requires an understanding[7] of the factual context. Pursuant to a sale on March 30, 1990, RAD acquired the convenience stores (all heavily encumbered by third party liens) from Callen, for which RAD agreed to pay Callen the profits[8] from operations. As required by the Bankruptcy Operating Order, Rehearing App. 2, these revenues were fully accounted for on the BA-1s and BA-2s filed regularly with the Bankruptcy Court. Rehearing App. 3 and 4.

The stores barely survived until spring 1992 when the likelihood of conversion to Chapter 7 damaged Callen's relations with its creditors. RAD informed the bankruptcy court by letters attached to the BA-1s, Rehearing App. 3-20, that it intended to stop sending the stores' revenues into the Callen DIP account and explained that all of the underlying

---

[7] For example, a central fact referred to in the opinion is that Dennis failed to disclose numerous bank accounts. There is no proof of this referred to in the government's brief below, nor is there proof in the record. The single most important account, the Callen DIP account, was disclosed, indeed, it was *opened by direction of the Operating Order*. See Rehearing App. 2-11-13 and 5-2, yet its "concealment" was a major element of petitioner's fraud and money laundering convictions. The accounts on which 28 of the 30 money laundering transactions were based were *disclosed on the BA-1s and BA-2s*. Rehearing App. 3, 4, 5 and 9. These facts were proven by the government.

[8] The government contended—in the face of substantial evidence to the contrary—that the sale agreement was backdated. For purposes of this Petition, petitioner does not dispute the government's assertion. However, regardless of when or even if the transfer occurred, according to the main government witness, FBI Agent Turner, after Callen's bankruptcy was filed *there were no revenues of the convenience stores that were not put into the Callen DIP account*. Tr. 971-975. Callen was due and received these revenues before and during the bankruptcy pursuant to the sales contract. Thus, the specific charge in Count 4, concealment of revenues, is completely refuted by the only government evidence propounded on that issue.

transactions were detailed in RAD records. It was in this business context, all details of which are found in the bankruptcy file--admitted by stipulation as GX 129--that the government brought its charges.

It is black letter that a reviewing court must view the evidence in the light most favorable to the government, making all reasonable inferences and credibility determinations in its favor. *U.S. v. Majors*, 196 F.3d 1206 (11th Cir. 1999). On the other hand, "if the evidence so viewed gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, the conviction should be reversed." *U.S. v. Pennington*, 20 F. 3d 593,, 597 (5th Cir. 1994) and *U.S. v. Heberman*, 583 F. 2d 222 (5th Cir. 1978). In the instant case, the decision failed to apply these standards to the evidence presented by the government.

Unlike most cases in which sufficiency is an issue, the government's evidence on the critical charges--concealments in Counts 1, 2, 4 and 5 and the money laundering charges in Counts 11-40--consisted almost exclusively of the testimony of FBI Agents Frazier and Turner summarizing the bankruptcy documents, based not on personal knowledge, but solely on the documents. Since the agents had no personal knowledge apart from their review of the documents, their credibility is not truly at issue. The documents speak for themselves.

With respect to Count One--even disregarding the powerful defense evidence, including the only bankruptcy experts to testify--if one looks only at the actual documentary evidence moved in by the government it is undisputed that a) five accounts listed as concealed were closed prior to the commencement of the estate. See GX 187, which tracks the items in Count 1 (Items 3, 4, 12-14 closed before the bankruptcy filing) App. 6; b) five items were disclosed in GX 129 (Items 13, 18, 19, 20, 23, which is the Payroll Account *not charged* as concealed) App.6; and c) the Callen DIP account, into which all store revenues were deposited, Tr.

971-975, which was opened at the direction of the Operating Order and monthly reports were filed showing the revenues, profits and losses. App. 2, 3, 4 and 6. Three of the five Count 1 items (18, 19 and 23) although disclosed in the bankruptcy file, were determined by the opinion without record support to have been concealed for purposes of money laundering.

Not only are the specific items not proven according to the government's evidence, the different categories (closed accounts, disclosed accounts, accounts opened months after the bankruptcy, etc.) being placed in the same count create two improper consequences: 1) the count is duplicitous, *U.S. v. Melton*, 763 F.2d 401 (11th Cir.1985) and 2) since, for example, accounts closed before bankruptcy cannot be estate property, a conviction cannot be based on those items. Accordingly, the opinion's affirmance is in directly in conflict with *U. S. v. McIntosh*, 124 F. 3d 1330 (10th Cir.1997).

With respect to Count Two, all five stores said to have been concealed from the court were reported in the bankruptcy file. App. 9-37, 40 and 42, App. 5-22, and App. 4-21. Trustee Mixon actually signed a release for these stores to Ports Petroleum and Westinghouse. DX 8 and 9 and App. 7 and App. 17-56-64. The properties, including their inventories[9], had no equity, and were fully encumbered. No evidence was presented that there were funds in the amount of $928,000 or any amount generated that could have been concealed. The opinion asserts that Mr. Dennis "failed to disclose a transfer of inventory to RAD." He was not charged with this alleged transfer of inventory. The grand jury charged the concealment of *revenues*, not property or assets. The government produced no evidence of the concealment of revenues. Indeed, Agent Turner testified that *all store*

---

[9] Bankruptcy Administrator Bedsole, a government witness, testified that the five stores listed in Count 2 and their inventories *were listed* in the initial bankruptcy disclosures. GX 129E and Tr. 322-325.

revenues went into the Callen DIP account and he saw none diverted. Thus, the government's evidence disproves Count 2.

With respect to Count Four, a particularly important count because it underlies the money laundering counts and the sentencing issue, the government claimed that the concealment was the transfer of $1.6 million from "concealed" Callen accounts (mainly the Callen DIP and the RAD c/o Callen accounts, both listed in the bankruptcy file) to Mr. Dennis' Dean Witter accounts. The government's evidence consisted primarily of GX 90, a chart that summarizes transfers from *April 1990* to November 1991. Since the only evidence includes transfers for a period of *one year before* the bankruptcy without differentiation, there is no way a juror, aside from speculating, could determine what, if any, transfers summarized occurred *after April 2, 1991*, when the estate commenced. The GX 90 summary was composed of three accounts not even alleged to have been part of the bankruptcy fraud and another account that was closed before there was an estate. App. 6, Tr. 1014-16. There was no differentiation or identification of these funds. Because the jury had no way of telling what amounts were transferred from which accounts nor what transfers were made from the estate, the government's evidence required the jury to speculate.

The claim that these accounts were concealed and not reported to the Bankruptcy Court is conclusively disproven by the government's evidence that the Callen DIP account, App. 5, was the operating account for the bankruptcy estate whose activities were reported each month and quarterly in the BA-1s and BA-2s. This was the source of much of the alleged $1.6 million transfer to the Dennis Dean Witter account. The Callen DIP (No. 0151167) App. 5 and 89-54, and RAD c/o Callen (No. 151050) App. 4-21, and the Callen Payroll[10] (No.

---

[10] The Callen Payroll account was disclosed and not charged in Count 1. Agent Frazier testified that no payroll checks were charged in the

0151043) App. 4-21 and 9-37, accounts were listed in the bankruptcy file, a public record. Mr. Dennis was actually indicted for concealing two of these disclosed accounts in Count 1, Items 18 and 19. Not only was there insufficient evidence to support Count 4, the proposition that a prosecution for concealment under §152(1) can be based on accounts reported in, indeed, opened for the purpose of administering the bankrupt estate is contrary to all authority in the 11th Circuit and bankruptcy procedure.

Concealment includes withholding of knowledge or preventing disclosure. *U.S. v. Grant*, 971 F.2d 799 (1st Cir. 1992). The government must prove concealment beyond a reasonable doubt and may receive the benefit of reasonable inferences. Before one may draw a reasonable inference, there must be a factual predicate from which to infer. Here the factual predicate demonstrated by the government's exhibits is that those accounts and items that qualified as property of the estate were set forth in the bankruptcy file. It is not reasonable to infer concealment by petitioner's setting the items forth in the bankruptcy file.

Where a jury has two alternative facts, one which shows concealment and other is found not to have shown concealment, the conviction must be reversed. *U.S. v. McIntosh, supra and Mills v. Maryland*, 486 U.S. 367 (1988). Because even in the light most favorable to the government, these items could not have been concealed, the evidence was insufficient as to Counts 1, 2, 4, and 5 and cannot support the factual predicates for the Court's findings on the unanimity, duplicity and variance issues, those important findings are erroneous and in conflict with settled law.

---

indictment. However, the government evidence shows that checks from the undeniably disclosed payroll account were charged in Counts 13, 19, 33, 35, 37 and 38. Convictions on these counts cannot stand under any standard of sufficiency.

The opinion states that Mr. Dennis "concealed property from the bankruptcy court by transferring approximately 1.8 million from Callen bank accounts [most came from the DIP account] to his personal accounts. These transfers were not reported on his bankruptcy filings." This may imply that the 11th Circuit has found some duty[11] to report each individual transaction in operating accounts in the bankruptcy court *different from the obligation imposed by the Bankruptcy Operating Order* under which the bankruptcy was conducted. The Callen Operating Order of April 4, 1991, App. 2-14, requires at Paragraph K that the debtor file completed copies of the BA-1s and BA-2s. It cannot and has not been disputed that Mr. Dennis filed those bankruptcy forms as required. The forms require only a summary of activities, not the report of each transaction. There was no evidence that more than a summary report is required. There was and is no statute, regulation, operating order, or anything of that nature that supports the opinion's bald assertion. This holding will expose all debtors and bankruptcy practitioners to prosecution if they comply with Bankruptcy Operating Orders. Therefore, certiorari should be granted.

IV. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN THE APPLICATION OF SUFFICIENCY STANDARDS AND REQUIREMENTS OF A UNANIMOUS VERDICT.

Virtually the entire evidence in this case was provided by the bankruptcy and business documents gathered by the government. As pointed out above, in most critical respects the documents themselves demonstrated that the items said to have been concealed had been disclosed in the bankruptcy files. The 11th Circuit's abandoning the settled principles of

---

[11] If this uncharged theory of bankruptcy fraud is adopted, the same transfer cannot support money laundering. *U.S. v. Christo*, 129 F.3d 578 (11th Cir.1997).

sufficiency evaluation opens the door for speculation by a fact finder. *U.S. v. Majors*, 196 F.3d 1206 (11th Cir. 1999); *U.S. v. Pennington*, 20 F. 3d 593, 597 (5th Cir. 1994) and *U.S. v. Heberman*, 583 F. 2d 222 (5th Cir. 1978). The most egregious instance of this is that a large part of petitioner's bankruptcy fraud convictions and most of the money laundering convictions were based on transactions in the Callen DIP account. This account was opened at the direction of the Bankruptcy Operating Order and all transactions were reported as required, yet the DIP account was found to have been concealed. This ruling eliminates any restraints on jury speculation and undercuts the sufficiency case law cited above.

The Callen DIP account and all revenue transactions were reported in summary form as required by the Operating Order and the directions for reporting under the Bankruptcy Forms BA-1 and BA-1. Petitioner, his attorney and all debtors throughout the federal bankruptcy system rely on the directions provided in the Operating Orders. Yet petitioner's undisputed compliance with the reporting requirements of the Bankruptcy Court was not found sufficient disclosure by the 11th Circuit in this case. After the *Dennis* case, no debtor can rely on an Operating Order of the Bankruptcy Court as a safe harbor for disclosures sufficient to protect him from prosecution under 18 U.S.C. §152(1). This significant and far-reaching disruption preventing reliance on bankruptcy Operating Orders should be cured by granting certiorari in this case.

V. THE DECISION BELOW APPLYING INCORRECT STANDARDS FOR WEIGHING THE SUFFICIENCY OF THE EVIDENCE OF MONEYLAUNDERING CONFLICTS WITH PRIOR DECISIONS OF THE ELEVENTH CIRCUIT AND OTHER CIRCUITS

To commit the offense of money laundering requires a person to 1) acquire the proceeds of a specified unlawful activity, and then (2) conduct a financial transaction with

those proceeds. 18 U.S.C. S 1956(a)(1). Section 1956 (a)(l)(B)(i) additionally requires that the financial transaction be conducted with the knowledge that the transaction is designed to conceal or disguise the nature, source, ownership, or control of the proceeds. *U.S. v. Sanders*, 929 F.2d 1466, 1472 (10th Cir. 1991); *U.S. v. Johnson*, 971 F.2d 562 (10th Cir. 1992); *U.S. v. Christo*, 129 F.3d 578 (11th Cir. 1997); *U.S. v. Majors*, 196 F.3d 1206 (11th Cir. 1999); *U.S. Manukarious*, 151 F.3d 694 (7th Cir. 1998); *U.S. v. Schoff*, 151 F.3d 889 (8th Cir. 1998); *U.S. v. Olanyi-Oke*, 199 F.3d 767 (5th Cir. 1999). The opinion ignored the necessary statutory requirements to sustain the convictions of the money laundering charges in Counts 11-40.

The Court must determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The government's evidence conclusively showed that the accounts used in the money laundering charges in Counts 11-40 were properly disclosed in the Bankruptcy Court file as required, with the exception of Count 11, which was not a wire from a Callen bank account and Count 15 which was a personal account of the petitioner and not required to be disclosed under any reading of the Bankruptcy Code.

The petitioner appended to his Petition For Rehearing and Suggestion For Rehearing En Banc, copies of the actual Bankruptcy Court file that discloses in accordance with the Standing Order the DIP checking account which was used in Counts 26, 29, 30, 31, 32, 34, 39, 40. The RAD account{Acct. 1051050) used in Counts 12, 14, 16, 17, 18, 20, 21, 22, 23, 24, 25, and the Callen Payroll Acct (Act. 1051043), Counts 13, 19, 33, 35, 37 and 38, were also fully disclosed in the Bankruptcy Court file. Indeed, government witness Bedsole, the Bankruptcy Administrator, testified that the accounts used in the above counts were disclosed in the Bankruptcy Court files.

To affirm the money laundering in Counts 12-40, the opinion found that the "government proved that Dennis engaged in transfers from the concealed Callen Bank accounts into his personal accounts. Dennis failed to disclose these funds, and thus kept them beyond the reach of the bankruptcy court." This is not in the evidence. The government's own evidence is to the contrary. App. 2-5, 8, 9, and 11.

The government evidence shows the transfers for Counts 26 through 32, 34, 36 and 39 were drawn on the Callen DIP, UniSouth Account No. 51167; Counts 12, 14 through 18 and 20 through 25 were drawn on the RAD c/o Callen, UniSouth Account No. 151050; and Counts 13, 19, 33, 35 and 37-38 were drawn on the Callen Payroll Account No. 0151043. App. 13, 14, 15. Count 40 was indicted as a check drawn on Dean Witter and deposited into Dean Witter, but the check was drawn on the Callen DIP account so it cannot stand. App. 13-48. All of the accounts charged were disclosed in the bankruptcy file, except Count 15, which was Mr. Dennis' personal account and not required to be disclosed. Thus, the opinion permits the jury to speculate on notions contrary to the government's evidence, the only evidence presented on these issues. This is in conflict with previous authority. *See Mills, McIntosh, Majors, Pennington, and Heberman, supra.* and certiorari should be granted to remedy this significant alteration of the principles of sufficiency of evidence.

Count 11 charged appellant with having laundered funds by a wire transfer from a Callen bank account to his brother. According to the government documentary evidence, the funds were not wired from a Callen bank account. App. 11. The Deposit Guarantee statement (GX 10) covering November 12, 1992, and the wire receipt prove without doubt that the wire transfer was not taken from that bank account, but came directly from cash wired by Sonya Frierson. Tr. 494. There is insufficient evidence to support this count.

Even if the cash wire itself is found to have been bankruptcy fraud, a money laundering conviction cannot be

had because the underlying activity *must be complete* before money laundering can occur. *U.S. v. Christo*, 1229 F.3d 578, 580 (11th Cir. 1997) A wire transfer that generates the proceeds of the illicit activity cannot also be the transaction constituting the money laundering. *U.S. v. Johnson*, 971 F.2d 562 (10th Cir. 1992). To affirm Count 11 is contrary to well-settled law on money laundering in all Circuits.

These transfers cannot be regarded as having been conducted with intent to conceal since, according to the government evidence, most of the Callen transfers were redeposited to the Callen accounts. It is difficult to rationalize a money launderer going to the trouble of laundering and then putting the funds back whence they came. The opinion is, accordingly, in direct conflict with *U. S. v. Christo*, 129 F.3d 578 (11th Cir. 1997); *U.S. v. Cochran*, 109 F.3d 660, 665 (10th Cir. 1997) (duty to disclose); and McIntosh, 124 F.3d at 1333. The Court should grant certiorari to establish that well-settled principles of sufficiency of the evidence and the requirements of money laundering law have not been rejected and to modify the 11th Circuit's conflict with other Circuits.

VI. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN THE APPLICATION OF MONEY LAUNDERING STANDARDS

The conviction in Count 11 is based on a wire from a store employee, which, if it constitutes bankruptcy fraud, cannot also constitute the transaction for which a money laundering conviction may be had. This conviction undercuts the requirement of obtaining the proceeds before the illicit financial transaction is performed, e.g., *U.S. v. Christo*, *supra*. If the transaction need not be in proceeds obtained from the illicit activity, there is a far-reaching impact on all federal money laundering prosecutions.

While the money laundering convictions should not stand because there was insufficient evidence to convict

petitioner of the underlying bankruptcy fraud, the failure to provide any evidence of concealing or disguising the nature, source or control of the proceeds is a significant and recurring issue in money laundering prosecutions. The 11th Circuit's decision virtually eradicates that requirement and is in direct conflict with the statute, 18 U.S.C. §1956(a)(1)(B)(i) and *U.S. v. McIntosh*, 124 F.3d at 1333, *U.S. v. Cochran*, 109 F3d 660, 665 (10th Cir. 1997) and *U.S. v. Garcia-Emanuel*, 14 F.3d 1469 (10th Cir. 1994). Certiorari should be granted to correct this far-reaching and significant misinterpretation of the money laundering requirement of concealing and disguising.

VII. THE COURT'S DECISION APPLYING THE SENTENCING GUIDELINES FOR MONEY LAUNDERING IS IN CONFLICT WITH THE SENTENCING GUIDELINES AND CASE LAW IN THE ELEVENTH AND OTHER CIRCUITS

While we recognize that a court's calculation of the guidelines will be given deference, *U.S. v. Malgoza*, 2 F.3d 1107 (11th Cir.1996), where the guideline is improperly applied, the Court should require a correct application of the facts to the Guidelines. *U.S. v. Kirkland*, 985 F.2d 535, 537 (11th Cir.1993).

The value of funds involved in a money laundering offense is a specific offense characteristic. U.S.S.G. § 2S1.1(b). Petitioner was charged with 18 U.S.C. §152(1), bankruptcy fraud which is calculated under U.S.S.G. §2F1.1.. The transactions that the government alleges were money laundering charges were, in fact, the same transactions the government claimed as fraud in Count 4. Bankruptcy Fraud

At sentencing, the trial court did not conduct an analysis of the actual amount taken from the bankrupt estate, but enhanced the base level by adding *all* of the loss figures alleged in all money laundering counts, $2,974,079, without determining the actual loss. The court did not consider the large sums that were deposited back into the Callen DIP and

RAD c/o Callen accounts and other returns to Callen. According to Agent Frazier, Dennis took a net amount of approximately $319,000.

U.S.S.G. §2S1.1(b)(2), explains that the court must take into account "all acts and omissions committed . . . by the defendant . . . during the commission of the offense. *U.S. v. Barrios*, 993 F.2d 1522, 1524 (11th Cir.1993). However, the circuits are split as to the application of S 251.1(b). *See U.S. v. Mullens*, 65 F.3d 1560 (11th Cir. 1995) and *U.S. v. Wilson*, 98 F. 3d 2B1 (7th Cir. 1996) (grouping of funds under 3D1.2). But *see U.S. v. Johnson*, 971 F.2d 562 (10th Cir. 1992).

As is undisputed, Mr. Dennis redeposited in the Callen bankruptcy accounts large amounts of the allegedly laundered funds. Under both U.S.S.G. §2F1.1 and the U.S.S.G. §2B1.1, which control enhancement to the base level for property offenses, a series of shifting transactions does not increase the amount actually taken, Application Note 2, to §2B1.1. When all of petitioner's acts are taken into account, the net amount is calculated by offsetting the contemporaneous redeposits against the outgoing transactions to arrive at net amount taken. Application Note 2, to §2B1.1. *U.S. v. Marker*, 871 F.Supp. 1404 (DC Kan. 1994); and cf. *U. S. v. Orton*, 73 F.3d 331 (11th Cir. 1996) (calculate *net loss* for each individual Ponzi victim.) Since the Dennis proceeds were at most $319,000 according to the government, the enhancements should be reduced accordingly.

Certiorari should be granted on this issue because the application of the money laundering guidelines are in conflict with other decisions of this and other Circuits and this is a truly important matter that arises frequently, yet has not been addressed fully by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

BRIAN W. SHAUGHNESSY
SHAUGHNESSY, VOLZER & GAGNER, P.C.
1155 Fifteenth Street, N.W., Suite 502
Washington, D.C. 20005
Telephone: (202) 371-2281

Attorney for Petitioner
James H. Dennis

June 7, 2001

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6342
D. C. Docket No. 96-00081-CR-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Versus

JAMES HAROLD DENNIS,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama

(January 8, 2001)

Before COX, WILSON and GIBSON*, Circuit Judges.

*Honorable John R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

WILSON, Circuit Judge:

James Harold Dennis appeals his sentences and convictions for bankruptcy fraud, money laundering, wire fraud and bank fraud. For the reasons below, we affirm all convictions and sentences except those for bank fraud.

I. BACKGROUND

Dennis was convicted of five counts of bankruptcy fraud in violation of 18 U.S.C. § 152, twenty-nine counts of illegal transfer of funds (money laundering) in violation of 18 U.S.C. §1956(a)(1)(B)(i), two counts of wire fraud in violation of 18 U.S.C. § 1343 and one count of bank fraud in violation of 18 U.S.C. § 1344. He was sentenced to 60 months of imprisonment for the bankruptcy fraud and wire fraud counts, to be followed by three years of supervised release. He was sentenced to 125 months of imprisonment for the money laundering counts and bank fraud to be followed by five years of supervised release. His prison terms were to run concurrently for a total of 125 months and his supervised release terms were to run concurrently for a total of five years.[1]

In 1988, Dennis formed Callen, Inc. ("Callen") for the purpose of establishing and managing several convenience stores in Alabama and Mississippi. Dennis was the president and 100% owner of Callen. In 1988, Dennis also established R.A.D., Inc. ("R.A.D."). Later that year, acting on Callen's behalf, Dennis purchased the assets and assumed the debts of Dottley/Garner Investments ("Dottley"), a Mississippi company that owned and operated convenience stores. At the time of the transaction, Dottley was involved in Chapter 11 bankruptcy proceedings. Because Dennis was a convicted felon, he could not obtain a liquor or gas license in Mississippi, which was necessary to operate a convenience store. To be able to control Callen's newly acquired Mississippi convenience stores, Dennis appointed Doyce Reeves as president and 100% owner of R.A.D. Reeves later sold all of R.A.D.'s stocks to Dennis for ten dollars. In 1990,

---

[1] The jury found Dennis not guilty on counts three, seven and eight (one count of bankruptcy fraud and two counts of money laundering). The government voluntarily dismissed counts none and ten for money laundering.

Dennis and Reeves filled out the pertinent Mississippi licensing forms.

On April 2, 1991, Callen filed for Chapter 11 bankruptcy. As we shall discuss in greater detail, the government presented evidence at trial that Dennis (1) transferred money from Callen's bank accounts into his personal accounts without reporting the transfers on his bankruptcy petition; (2) falsely stated that Callen had no bank accounts; transferred money from Callen bank accounts to his brother and failed to list them on his bankruptcy petitions; (3) back dated sales receipts to demonstrate that all of Callen's assets were sold to R.A.D. so that they could not be reached by the bankruptcy court; (4) destroyed documents related to Callen's financial affairs; and (5) wrote bad checks, impersonated a bank official and forged an attorney's signature .

The issues on appeal are: (1) whether the district court amended the indictment when it instructed the jury on the elements of bankruptcy fraud; (2) whether there was a variance between the indictment and the evidence presented at trial; (3) whether there was sufficient evidence to support Dennis's convictions for bankruptcy fraud, money laundering, wire fraud and bank fraud; (4) whether the indictment and district court's instructions deprived Dennis of a unanimous verdict and whether count one was duplicitous; (5) whether the district court erred in applying the money laundering sentencing guidelines; (6) whether the district court erred in determining the amount of loss; (7) whether the district court improperly grouped counts and (8) whether the district court erred in computing Dennis's criminal history points.

II. DISCUSSION

(1) Jury Instruction on Bankruptcy Fraud

Dennis contends that the district court amended the indictment when it instructed the jury on bankruptcy fraud by omitting the term "creditors," and substituting the term

"custodian of the Bankruptcy Court." The superseding indictment charged that Dennis "knowingly and fraudulently did conceal property belonging to Callen, a debtor in a case under Title 11, . . . , from the United States Bankruptcy Court, . . . and from creditors . . . ." The district court gave the following jury instruction for bankruptcy fraud:

> The defendant can be found guilty of [bankruptcy fraud] only if all the following facts are proved beyond a reasonable doubt . . . Second, the defendant knowingly and fraudulently concealed the property discussed in the indictment from the custodian of the Bankruptcy Court and the property belonged to the estate of the debtor.

Dennis failed to raise this argument before the district court. Therefore, we apply the plain error standard of review, inquiring whether an error occurred, whether the error was plain and whether the error "affected substantial rights." *United States v. Mitchell*, 146 F.3d 1338, 1342 (11th Cir. 1998).

An amendment to an indictment occurs "when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." *United States v. Keller*, 916 F.2d 628, 634 (11th Cir. 1990). The jury instruction on bankruptcy fraud did no such thing. It tracked the language of the statute and comported with the indictment.

Pursuant to 18 U.S.C. § 152(1) "a person who . . . knowingly and fraudulently conceals from a custodian, trustee, marshal or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor" shall be fined and/or imprisoned. 18 U.S.C. § 152(1).

"Custodian" is defined by Title 11 as a "trustee, receiver, or agent under applicable law . . . that is appointed or authorized to take charge of property of the debtor for the purpose of . . . general administration of such property for the

benefit of the debtor's creditors." 11 U.S.C. § 101 (11)(C). Custodians are appointed by the bankruptcy court. *See id.* Lonnie Mixon was appointed as the trustee of the bankruptcy estate and Travis M. Bedsole was appointed as the bankruptcy administrator. The trustee and administrator are "custodians" under the plain meaning of 11 U.S.C. § 101(11)(C). Essentially, the custodian is a "custodian of the bankruptcy court." *United States v. Greenwood*, 74 F.3d 1241 (6th Cir. 1996) (unpublished). Custodians or trustees "'are creatures of the Bankruptcy Act.'" *In re Red Carpet Corp. of Panama City Beach v. Miller*, 708 F.2d 1576, 1578 (11th Cir. 1983). As the trial testimonies illustrate, they are entrusted with the administration of property in the bankruptcy court's custody. *See* 11 U.S.C. § 101(11)(C); *In re Red Carpet*, 708 F.2d at 1578. However, the bankruptcy court is the "ultimate custodian" of the estate. *See id.* at 1578-79.

Under either a strict or broad construction of the term "custodian," the indictment's inclusion of the term "bankruptcy court" rather than "custodian" does not render it infirm. The indictment comports with 18 U.S.C. § 152(1). Furthermore, the indictment also included the term "creditors" as a victim of the bankruptcy fraud. It cannot be disputed that the creditors of the bankruptcy estate were entitled to the concealed monies. *See United States v. Levine*, 970 F.2d 681, 686 (10th Cir. 1992).

The jury instruction did not amend the indictment by including the phrase "custodian of the bankruptcy court." It comports with 18 U.S.C. § 152(1). The district court did not plainly err in giving the instruction.

(2) Variance Between Indictment and Evidence at Trial

Dennis contends that there was a fatal variance between the indictment and the proof at trial. According to Dennis, the indictment charged him with knowingly concealing property from the bankruptcy court and creditors; however, the government proved only that he made a false oath to the

bankruptcy court and not that he concealed anything from creditors.

Because Dennis failed to raise this argument at the trial level, we review it under the plain error standard. *See Mitchell*, 146 F.3d at 1342. "The standard of review for whether there is a material variance between the allegations in the indictment and the facts established at trial is twofold: First, whether a material variance did occur, and second, whether the defendant suffered substantial prejudice as a result." *United States v. Chastain*, 198 F.3d 1338, 1349 (11th Cir. 1999). The first prong of this test is not met because no material variance occurred.

Counts one, two, four and five of the superseding indictment charge Dennis with knowingly and fraudulently concealing property belonging to Callen from the bankruptcy court and creditors in violation of 18 U.S.C. § 152. Count six alleges that Dennis "knowingly and fraudulently did conceal, destroy, and mutilate books, documents, records and papers relating to the property and financial affairs of Callen Corporation, a debtor in a case under Title 11, . . . , in violation of" 18 U.S.C. § 152.

One can violate 18 U.S.C. § 152 if he "knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;" or "knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11." 18 U.S. C. § 152(1), (2). The government charged Dennis with concealment in violation of 18 U.S.C. § 152(1) rather than with making a false oath under 18 U.S.C. § 152(2).

Whether property is part of the bankruptcy estate is a factual issue for the jury. *See United States v. Blane*, 375 F.2d 249, 252-53 (6th Cir. 1967) (approving jury instruction that included requirement of jury finding that property in

question belonged to the bankruptcy estate); *Greenwood*, 74 F.3d 1241. There was sufficient evidence from which a jury could conclude that Dennis concealed assets belonging to the bankruptcy estate by failing to disclose on his bankruptcy filings numerous bank accounts in the name of Callen, transfers from Callen to other accounts, a transfer of inventory to R.A.D., and an account receivable that Mantissa Corporation owed Callen. The government also proved that Dennis destroyed documents related to Callen's financial affairs. Dennis's failure to disclose the existence of property belonging to Callen's (the debtor's) estate constitutes concealment. *See United States v. Ward*, 197 F.3d 1076, 1080 (11th Cir. 2000) (defendant concealed property belonging to the bankruptcy estate by failing to disclose it on his bankruptcy petition).

Upon our careful review of the record, we find no variance between the indictment and the proof at trial.

(3) Sufficiency of the Evidence

Dennis contends that the evidence was insufficient to support his convictions

for bankruptcy fraud, money laundering, wire fraud and bank fraud. "Whether there is sufficient evidence to support the convictions is a question of law subject to *de novo* review." *United States v. Majors*, 196 F.3d 1206, 1210 (11th Cir. 1999), *cert. denied*, ___U.S.___, 120 S. Ct. 2022 (2000). We review the evidence in the light most favorable to the government, making all reasonable inferences and credibility determinations in its favor. *See id.* Applying this standard of review, we address each offense in turn.

a. Bankruptcy Fraud

Based on the evidence presented at trial, a reasonable jury could have found Dennis guilty of five counts of bankruptcy fraud for concealing property belonging to the bankruptcy estate. We need not discuss each of the numerous items that Dennis was charged with concealing.

Among other things, Dennis was required to disclose all bank accounts in which the debtor (Callen) had any interest as well as any transfer of Callen assets within one year preceding the commencement of the bankruptcy case. *See* 11 U.S.C., Official Bankruptcy Form 7. The bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." 11 U.S.C. § 541(a)(1). Dennis did not disclose the property alleged in the indictment on his bankruptcy schedules or statement of financial affairs. He indicated that Callen had no bank accounts and no interest in any bank account. During his deposition, he testified that no bank accounts were in Callen's name. However, at trial the evidence established that Callen owned or had an interest in fifty-five bank accounts. In September, 1991, Dennis's accounting firm compiled a quarterly balance statement showing that Callen retained fifty bank accounts and had extensive assets. At trial, FBI Special Agent Tim Turner explained that each of the accounts were in the name of Callen or contained funds transferred from Callen within two years of the bankruptcy filing.

Dennis contends that none of these accounts belonged to Callen because R.A.D. purchased them in 1990. This contention is belied by the evidence which demonstrates that when R.A.D. filed for bankruptcy, none of the accounts allegedly transferred in 1990 were contained in R.A.D.'s financial disclosure. Dennis also failed to disclose a transfer of inventory to R.A.D.. The president of R.A.D. confirmed that no money was paid for the inventory and that he knew nothing about the sale. R.A.D.'s tax filings showed that it had no income and only $1,000 in assets.

The evidence at trial also established that Dennis concealed property from the bankruptcy court by transferring approximately 1.8 million dollars from Callen bank accounts to his personal accounts. These transfers were not reported on his bankruptcy filings. At trial, it was further proven that Dennis transferred over four hundred thousand dollars from Callen accounts to his brother and that his brother's company,

Mantissa Corporation, owed Callen money as an account receivable. Neither the account receivable nor the transfers were reported on the bankruptcy filings.

At trial, the government proved that Dennis destroyed or concealed financial documents relating to Callen. He paid someone to shred Callen documents which were taken to a landfill. He asked Callen's computer analyst to duplicate Callen's books under the name of R.A.D.. He told the computer analyst that lightening struck Callen's computer and erased selected files, and he also asked the analyst to delete more files. When the bankruptcy trustee went to inspect Callen's documents, Dennis told him that Callen did not have any documents. The trustee did not find any documents relating to Callen. However, when the government subpoenaed Dennis's accounting firm's records, they indicated that Callen had numerous financial records which revealed that Callen had fifty bank accounts with a total balance of over $500,000 at the time the bankruptcy petition was filed.

Based upon the foregoing evidence, a reasonable jury could conclude that Dennis was guilty of the five counts of bankruptcy fraud for which he was convicted, beyond a reasonable doubt.

b. Money Laundering

Dennis was convicted of twenty-nine counts of money laundering (illegal transfer of funds) in violation of 18 U.S.C. § 1956 (a)(1)(B)(i). It was alleged that Dennis

knowingly and wilfully did conduct and attempt to conduct the below- listed financial transactions affecting interstate commerce, that is, deposits into the below-listed [personal accounts] . . . , which involved the proceeds of a specified unlawful activity, that is bankruptcy fraud, a violation of Title 18, United States Code, Section 152, knowing that the transactions were designed in whole or in part to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of

specified unlawful activity, to wit: bankruptcy fraud . . . . and that while conducting and attempting to conduct such financial transactions the defendant knew that the property involved in the transactions, that is the deposits . . . represented the proceeds of some form of unlawful activity . . . all in violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and Section 2.

A defendant violates 18 U.S.C. § 1956 if "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, [he] conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity. . .knowing that the transaction is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . . ." 18 U.S.C. § 1956(a)(1)(B)(i); *see also Ward*, 197 F.3d at 1083 (citation omitted) ("To obtain a conviction under § 1956(a)(1)(B)(i), the government must prove beyond a reasonable doubt 'that the party engaged in the transaction knew that the funds used represented, in whole or in part, proceeds of a specified unlawful activity.'").

An element of the offense is a transaction involving a financial institution. This "'includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, . . . or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.'" *Id.* (quoting 18 U.S.C. § 1956(c)(3)). The statute also requires a "specified unlawful activity" to predicate money laundering. The phrase "specified unlawful activity" includes bankruptcy fraud proscribed by 18 U.S.C. § 152. *See id.* at 1081-82.

The government proved that Dennis engaged in transfers from the concealed Callen bank accounts into his personal accounts. At trial, Special Agent Ruth Frazier traced every check, listed in the money laundering counts of the indictment, which Dennis sent from a Callen account to his personal brokerage accounts. The funds were concealed from

the bankruptcy court. Dennis failed to disclose these funds, and thus kept them beyond the reach of the bankruptcy court. *See Ward*, 197 F.3d at 1080 (defendant concealed property belonging to the bankruptcy estate by failing to disclose it on his bankruptcy filings); *United States v. Thayer*, 204 F.3d 1352, 1354-55 (11th Cir. 2000) (defendant funneled profits from one company to other companies and fictitious business accounts and then into her personal account; evidence was sufficient to prove that she intended to conceal the funds). Additionally, while under Chapter 7 bankruptcy and therefore under the control of the trustee, Dennis directed a bank employee to wire funds from a Callen account to the Mantissa Corporation. Dennis had no authority to make this transfer and it was not disclosed to the trustee or the bankruptcy court.

Viewing the evidence and all reasonable inferences therefrom in the light most favorable to the government, a reasonable jury could have concluded that Dennis fraudulently concealed property belonging to the bankruptcy estate because he knowingly withheld information related to the property and acted to prevent the discovery of the property, thereby intending to deceive the bankruptcy court, the estate's creditors, or the custodian. This resulted in financial loss to the estate and financial gain to Dennis. *See Ward*, 197 F.3d at 1080; *see also Merriam Webster's Collegiate Dictionary* 238 (10th ed. 1996) ("concealment" is defined as preventing disclosure or recognition or placing out of site).

The property itemized in the indictment came from an unlawful source because it "emanated from a bankruptcy fraud." *Levine*, 970 F.2d at 686. There was sufficient evidence from which a reasonable jury could conclude that Dennis was guilty of the money laundering offenses beyond a reasonable doubt.

c. Wire Fraud

Under 18 U.S.C. § 1343, one who "having devised or intended to devise any scheme or artifice to defraud, or for

obtaining money or property by means of false pretenses, representations, or promises, transmits . . . by means of wire, . . . in interstate . . . commerce, any writings, . . . or sounds for the purpose of executing such scheme or artifice" shall be fined and/or imprisoned. 18 U.S.C. § 1343. To obtain a conviction for wire fraud, the government was required to prove that Dennis "intentionally participated in a scheme to defraud" and that he "used wire communications to further that scheme." *United States v. Brown*, 40 F.3d 1218, 1221 (11th Cir. 1994).

The trial evidence established that Dennis wrote numerous checks when there were insufficient funds in R.A.D.'s account at the People's Bank. The checks were made out to Ed Garner for fuel shipments. Dennis called Garner's bank impersonating an employee of People's Bank and told the person he spoke to that Dennis's insufficient checks were attributable to a computer error by People's Bank. The evidence demonstrated that no employee of People's Bank actually made the call and that People's Bank did not have any computer problems. Dennis's voice was positively identified as the caller. The evidence established that Dennis wrote approximately forty-two insufficient fund checks and that Dennis forged a letter from his attorney stating that the overdrawn account was the attorney's fault.

Presented with the foregoing evidence, a reasonable jury could conclude that Dennis was guilty of wire fraud beyond a reasonable doubt.

d. Bank Fraud

Count forty-four of the indictment charges Dennis with bank fraud. Bank fraud is established under two alternative methods. *See United States v. Mueller*, 74 F.3d 1152, 1159 (11th Cir. 1996). To prove bank fraud under section 1344(1), the government must establish "that the defendant (1) intentionally participated in a scheme or artifice to defraud another of money or property; and (2) that the victim of the scheme or artifice was an insured financial institution." *United States v. Goldsmith*, 109 F.3d 714, 715 (11th Cir.

1997); *see also* 18 U.S.C. § 1344(1). To prove bank fraud under section 1344(2), the government must establish "(1) that a scheme existed in order to obtain money, funds, or credit in the custody of the federally insured institution; (2) that the defendant participated in the scheme by means of false pretenses, representations or promises, which were material; and (3) that the defendant acted knowingly." *Goldsmith*, 109 F.3d at 715; *see also* 18 U.S.C. § 1344(2). A conviction can be sustained under either section when the indictment and jury instructions, as in this case, charge both clauses. *See Goldsmith*, 109 F.3d at 716.

Dennis contends that the evidence does not establish fraud or that the banks allegedly defrauded were insured by the Federal Deposit Insurance Corporation (FDIC). "Proof of federally-insured status of the affected institution is, for . . . section 1344 . . . a jurisdictional prerequisite as well as an element of the substantive crime." *United States v. Key*, 76 F.3d 350, 353 (11th Cir. 1996). The contention that this element was not proved is a challenge to the sufficiency of the evidence. *See id.* Therefore, we view all evidence and reasonable inferences from the evidence "in the light most favorable to the verdict." *Id.*

The evidence at trial established that Dennis devised a scheme to obtain money by conducting a check kite where he would deposit insufficient funds checks drawn on a Callen account at Commercial Bank into his checking account at Deposit Guaranty National Bank and by writing checks on Callen's account, knowing that the account had insufficient funds. Dennis had signatory authority over both accounts and signed checks from both accounts.

The testimony of FBI Special Agent Charles English was equivocal about whether Commercial Bank and Deposit Guaranty National Bank were federally insured. Defense counsel's cross-examination of Agent English was as follows:

Q: Are these national banks that are involved in this case, sir?

A: When you say a "national bank" what are you referring to?

Q: Nationally chartered bank, banks chartered under the national laws of the [U]nited [S]tates.

A: Federally insured bank sir?

Q: Yes, sir.

A: Yes, sir.

Q: Both of them? Do you know?

A: I would have to look at the bank-- state certificate, the federal certificate to state for sure.

Q: Is the answer then--

A: I have not physically looked at the certificate for these banks.

Q: Is the answer then that you don't know?

A: I have been told by bank officials that they are federally insured. I cannot-I did not go any further, I took their word for it.

Q: You are telling this jury that both of these banks are national banks?

A: Federally insured banks.

Q: What are the name[s] of these banks, sir?

A: Commercial State Bank.

Q: Let's stop on that one, sir. Commercial State Bank, do you see the word national in the name of Commercial State Bank?

A: No, sir.

Q: Do you?

A: No, sir.

Q: Pardon me?

A: No, sir.

Q: Are you aware of the law that requires the use of the word national in nationally charted (sic) banks?

A: All I am aware of is that it's federally insured?

Q: I do know whether it's a national bank?

[Assistant U.S.] Attorney: Objection, I think its been asked and answered.

The Court: Yeah, sustained.

[Defense Counsel]: Q: What is the name of the other bank sir?

A: Deposit Guarant[y] National Bank.

Q: Do you know whether it's a national bank?

A: The name implies it, until I see the certificate.

Q: Do you know the difference in float time that would be applicable to a state bank as opposed to a national bank?

. . .

A: I know how the system runs. I know how it pertains on bank fraud. I am not an expert on the banking system. Just on bank fraud and check kiting as a form of bank fraud.

Q: Do you know the significance, if any, of one of these banks being a state bank, if it is?

A: I am not aware of how that would change the flow of money at all, it does not as far as I am aware.

Although Agent English's testimony does not establish beyond a reasonable doubt that Commercial Bank was federally insured, part of an exhibit admitted into evidence does. Government's exhibit thirty-four contains a letter from the vice president and cashier of Commercial Bank to FBI Special Agent Tim Turner. The letter is printed on bank stationary and contains the phrase "MEMBER FDIC" on the bottom.

In contrast, none of the documents related to Deposit Guaranty National Bank

give any indication that the bank was federally insured. Even when viewed in the light most favorable to the government, the evidence and all reasonable inferences drawn therefrom do not establish that Deposit Guaranty National Bank was federally insured. The agent's conclusion that the bank was federally insured appears to be premised upon his belief that because a bank is a "national bank," it is necessarily a "federally insured bank." This reasoning lacks legal support. A "national bank" is not necessarily "federally insured." As demonstrated by pertinent statutory provisions, the two concepts are distinct and not synonymous. *See* 12 U.S.C. § 1813.[2]

---

[2] Title 12, section 1813, of the United States Code governs banks and banking. Its definitional section provides in pertinent part:

(a) . . .

(1) Bank

The term "bank" --

(A) means any national bank, State bank, and District bank, and any Federal branch and insured branch;

. . .

(2) . . . The term "State bank" means any bank, banking association, trust company, savings bank, industrial bank (or similar depository institution which the Board of Directors finds to be operating substantially in the same manner as an industrial bank), or other banking institution which--

(A) is engaged in the business of receiving deposits, other than trust funds (as defined in this section); and

(B) is incorporated under the laws of any State or which is operating under the Code of Law for the District of Columbia (except a national bank),

. . .

(c) . . .

The evidence is insufficient to establish beyond a reasonable doubt that Deposit Guaranty National Bank was federally insured. Because this element of the offense was not proven, Dennis's conviction for bank fraud cannot stand. Accordingly, we reverse Dennis's conviction for bank fraud, vacate Dennis's sentence for bank fraud —125 months' imprisonment to be followed by five years of supervised release-- and remand the case for re-sentencing.

Remaining Issues

. . .

(4) Federal depository institution

The term "Federal depository institution" means any national bank, any Federal savings association, and any Federal branch.

(5) State depository institution

The term "State depository institution" means any State bank, any State savings association, and any insured branch which is not a Federal branch.

(d) . . .

(1) National member bank

The term "national member bank" means any national bank which is a member of the Federal Reserve System.

(2) State member bank

The term "State member bank" means any State bank which is a member of the Federal Reserve System.

. . .

(h) Insured bank

The term "insured bank" means any bank (including a foreign bank having an insured branch) the deposits of which are insured in accordance with the provisions of this chapter; and the term "noninsured bank" means any bank the deposits of which are not so insured.

12 U.S.C. § 1813(a), (c), (d), (e), (h).

The remaining issues raised by Dennis do not warrant discussion. We summarily reject Dennis's contentions with regard to those issues. *See* 11th Cir. R. 36-1.[3]

---

[3] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

III. CONCLUSION

There was sufficient evidence to sustain all convictions except that for bank fraud. We affirm in part, reverse in part and remand the case for re-sentencing.

Convictions and Sentences for bankruptcy fraud, money laundering, and wire fraud

are AFFIRMED.

Conviction for bank fraud is REVERSED. Sentence for bank fraud is VACATED.

The case is REMANDED for re-sentencing.

AFFIRMED in part, REVERSED in part, and REMANDED for re-sentencing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6342-CC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Versus

JAMES HAROLD DENNIS,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Alabama

---

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
MARCH 9, 2001
THOMAS K. KAHN, CLERK

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____F.2d _____).

Before: WILSON, COX, and GIBSON*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure;

Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/_____
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

*Honorable John R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.